

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARGARET R. METCALF

Claimant

VS.

MERCY HOSPITAL OF INDEPENDENCE

Self-Insured Respondent

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Docket Nos. 1,033,474;
1,033,475; & 1,036,262

ORDER

Respondent appealed the March 27, 2012, Award entered by Administrative Law Judge (ALJ) Bruce E. Moore. The Workers Compensation Board heard oral argument on July 20, 2012, in Wichita, Kansas.

APPEARANCES

William L. Phalen of Pittsburg, Kansas, appeared for claimant. Joseph R. Ebbert of Kansas City, Missouri, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award with the exception that none of the exhibits to the preliminary hearings will be considered as part of the record by the Board.¹ At oral argument the parties entered into the following stipulations:

1. In Docket No. 1,033,474, claimant suffered no permanent impairment of function to the left lower extremity and is not in need of future medical treatment.

2. In Docket No. 1,036,262, claimant sustained no permanent impairment of function and is not in need of future medical treatment.

¹ At the regular hearing and at oral argument to the Board, the parties agreed that with regard to the preliminary hearing transcripts only the testimony should be part of the record considered by the Board, but not the exhibits thereto.

3. In Docket No. 1,033,475, claimant had permanent functional impairments of 5% to the right lower extremity for residuals of the right ankle fracture, 62.5% to the right lower extremity for residuals of the right knee replacement and 5% whole body for the back injury. The foregoing combine for a 30% whole body impairment, which was the finding of ALJ Moore. Respondent, however, did not stipulate that the right knee or back impairments resulted from claimant's February 5, 2007, injury.

4. If the Board determines that claimant is not permanently and totally disabled in Docket No. 1,033,475, the parties agree she sustained a 100% wage loss and a 65% task loss for an 82.5% work disability.

ISSUES

In the March 27, 2012, Award, ALJ Moore found as follows:

Docket Nos. 1,033,474 and 1,036,262: In Docket No. 1,033,474 claimant sustained a left ankle injury on December 5, 2006. She alleges sustaining a right knee injury in Docket No. 1,036,262 on August 7, 2007. ALJ Moore found there was no evidence that claimant sustained a permanent functional impairment. Based on the stipulations of the parties, the ALJ's findings are affirmed.

Docket No. 1,033,475: Claimant was injured on February 5, 2007, when she left a client's home, slipped on ice and fell. ALJ Moore determined claimant's right ankle fracture caused her to have an altered gait which resulted in the development of right knee and low back injuries. He then concluded claimant had a 30% whole person impairment. ALJ Moore found claimant sustained a 65% task loss and a 100% wage loss for a work disability of 82.5%. He found it significant that Dr. Prostic related the progression of claimant's right knee and back pain to her altered gait following the February 5, 2007, right ankle injury. He also cited Dr. Amundson's opinion relating the development of claimant's low back pain to her fall. ALJ Moore concluded that after considering claimant's age, training, restrictions, previous work history and physical limitations, she met her burden of proof that she was permanently and totally disabled.

Also in dispute is a Hoveround motor scooter, originally prescribed by one of claimant's treating physicians. Respondent asserts the physician later determined the Hoveround was not medically necessary and, therefore, is not a reasonably necessary medical expense. ALJ Moore discussed the Hoveround in the "Findings of Fact" section of his Award, but not in the "Analysis and Conclusions of Law" or "Award" sections. However, he did indicate claimant was entitled to medical expenses, and any unauthorized medical expenses. In his Award, ALJ Moore implied that he considered the cost of the Hoveround was an approved medical expense. The ALJ also determined future medical would be considered upon proper application.

Respondent sets forth the following in its brief to the Board:

The primary issue before the Board is the Self-Insured Respondent's appeal that the Claimant has not been rendered permanently and totally disabled as a result of any occupational injury in the course and scope of her employment with Self-Insured Respondent. Furthermore, the compelling medical evidence indicates that the Claimant has only suffered a scheduled injury as a result of the February 2007 incident and has not been rendered permanently totally disabled from this condition and should only be awarded a permanent partial disability for the injury to the right ankle. Furthermore, it is disputed that the Self-Insured Respondent has failed to provide adequate medical care during the course of this case, and that the requirement for the use of the Hoveround, pursuant to the Orders of Judge Klein, were inappropriate and should be reversed. Lastly, although no specific benefits have been awarded as a result thereof, the incident of August 7, 2007, should be deemed to be a non-compensable occurrence from which no benefits should be awarded now or ever into the future, and should be found to not have arisen out of the course and scope of Claimant's employment with Self-Insured Respondent.²

Conversely, claimant maintains the ALJ correctly found she is permanently and totally disabled and that she sustained a whole body injury and functional impairment. Claimant contends the implicit award of the Hoveround should be affirmed, and maintains the injury to her right knee on August 7, 2007, is compensable.

The issues before the Board on this appeal are:

Docket No. 1,033,474:

There are no remaining issues for the Board to review.

Docket No. 1,033,475:

1. What is the nature and extent of claimant's disability? As a result of her work-related accident did claimant sustain a scheduled injury to the right ankle only, or also sustain injuries to her right knee and low back? Claimant asserts that as a result of an antalgic gait and inadequate medical treatment to her right ankle, she aggravated pre-existing right knee and low back conditions. Respondent asserts claimant's right knee injury was not connected to claimant's right ankle injury. It suggests claimant's altered gait and resulting back injury were caused by the right knee condition, which was not work related.

2. If claimant sustained a whole person impairment, is she permanently and totally disabled?

² Respondent's Brief at 15 (filed May 17, 2012).

3. Is the Hoveround reasonably necessary to cure and relieve claimant from the effects of her injury?

4. Is claimant entitled to future medical benefits?

Docket No. 1,036,262:

1. Did claimant sustain a right knee injury by accident arising out of and in the course of her employment with respondent? Were claimant's knee injury and resulting back injury caused by an activity of day-to-day living as alleged by respondent? Or, were claimant's right knee and back injuries the direct and natural consequence of her February 5, 2007, accident as claimant asserts?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

Docket No. 1,033,474:

Respondent paid \$80.09 in medical compensation. There were no other medical expenses. The parties agreed the ALJ was correct in finding claimant suffered no permanent impairment of function to the left lower extremity and is not in need of future medical treatment. Therefore, it is unnecessary to make findings of fact in Docket No. 1,033,474.

Docket No. 1,033,475:

While performing her work duties for respondent, on February 5, 2007, claimant walked out of a patient's home carrying a nurse's bag, and slipped on ice. Claimant testified she felt pain in her right leg, back and knee, so she drove herself to respondent's medical facility, Mercy Hospital in Independence, Kansas. There, x-rays were taken of the right foot, which revealed claimant's right ankle was fractured. Claimant testified she was not given any medications for pain and was sent home with her right ankle in an ankle device. She testified there was no further treatment to the right ankle. Claimant was discharged the same day and went to her sister's home in Caney, Kansas. Because of the severe pain she was in, on the same day claimant called Caney Ambulance and was taken to Jane Phillips Medical Center (Phillips Medical) in Bartlesville, Oklahoma, where she was seen by Dr. Thompson. The right foot was again x-rayed and claimant was prescribed pain medication and a cast was placed on her ankle.

Following the February 5, 2007, accident, claimant used a walker because the right ankle cast caused balance problems. After the cast was removed, claimant wore a boot, which caused her to walk awkwardly, which in turn caused increased pain in claimant's

right knee. According to claimant, since February 5, 2007, she has limped and the overall condition of her right leg has worsened.³ Claimant testified that the injuries for which she is seeking workers compensation benefits are the result of the February 5, 2007, injury.

Claimant testified that two days after the accident she was sent by respondent to see its workers compensation doctor in Independence, Kansas. According to claimant he looked at the right ankle briefly and indicated claimant could return to work within two or three weeks. On February 12, 2007, claimant went to see Dr. Jon Orjala on her own volition. He put a cast boot on the right ankle and told claimant she would be off work five weeks. Claimant had a follow-up visit with Dr. Orjala on February 27, 2007.

In April 2007, claimant returned to work for respondent. Her job was to sit in a chair all day and shred papers. Sitting bothered claimant's right knee and back, which she reported to respondent. She continued working until the incident on August 7, 2007, which gave rise to Docket No. 1,036,262. At the regular hearing, claimant indicated she had not driven in two years and has difficulty getting in and out of vehicles.

Docket No. 1,036,262:

Claimant had been performing shredding duties as described above, when on August 7, 2007, she went into the bathroom and felt her right knee pop when she sat down and again when she got up. At the time, claimant used a cane and had a limp as a result of her February 5, 2007, injuries. Claimant was taken to see Dr. Walker at Mercy Physicians Group in Independence, Kansas, where x-rays were taken of claimant's right leg, back and right side. MRIs were taken of claimant's right leg, back and right side. The MRI of claimant's right leg revealed claimant had a torn meniscus in the right knee. Claimant testified the MRIs also indicated that several of the vertebrae in her back were messed up. She indicated the neck and back hurt the same before and after the incident in the restroom, but her right knee condition was new. However, in her brief to the Board, claimant asserted the right knee injury was the natural consequence of the February 5, 2007, injury.

Following the August 7, 2007, accident claimant did not return to work as she was receiving medical treatment for her right knee condition. In September 2007, respondent terminated claimant during the course of her medical treatment. The parties agreed that all temporary total disability benefits and medical expenses were paid in Docket No. 1,033,475, and none were attributed to this docketed claim.

ALJ Moore found there was no evidence that claimant sustained a permanent functional impairment or was in need of future medical treatment.

³ P.H. Trans. (Nov. 28, 2007) at 18; P.H. Trans. (July 7, 2010) at 12.

Claimant's Medical Treatment and Medical Evaluations for Injuries Sustained in Docket Nos. 1,033,475 and 1,036,262:

The ALJ's Award gives a detailed and accurate rendition of claimant's medical treatment, medical evaluations, and vocational evaluations. It is not necessary to repeat that information here.

Procedural History and Facts Common to Docket Nos. 1,033,475 and 1,036,262:

In a July 2, 2007, Order ALJ Thomas Klein authorized Dr. Jon E. Orjala to be claimant's authorized treating physician for all treatment, tests and referrals. The doctor recommended claimant have right knee arthroscopic surgery for a torn lateral meniscus and degenerative joint disease of the lateral and patella femoral. Respondent, however, disputed that the February 5, 2007, accident caused claimant's right knee condition, and without court approval discontinued Dr. Orjala's treatment of claimant. Upon claimant's request, a preliminary hearing was held on November 28, 2007. On January 15, 2008, ALJ Klein ordered Dr. Brian Ellefsen to be the authorized treating physician for claimant's knees and ankles and any other body part that Dr. Ellefsen believed to be related to any of claimant's three accidents. ALJ Klein stated in his Order, "The Court considers the August 7, 2007 [injury] to be either a temporary aggravation, or in the alternative, a direct and natural consequence of the Respondent's failure to provide previous necessary and related Court ordered treatment."⁴

At the request of respondent another preliminary hearing was held on October 15, 2008. Claimant at that time had undergone two knee surgeries by Dr. Ellefsen. Respondent argued that the records of Drs. Ellefsen and Briggs proved claimant's right knee injury was not the result of her work-related accidents and requested the ALJ withdraw authorization of medical treatment of claimant's right knee. On November 3, 2008, ALJ Klein declined respondent's request to terminate claimant's benefits.

On April 27, 2009, Dr. J. Christopher Banwart determined claimant was in need of and he therefore prescribed a Hoveround motor scooter to ride. Respondent did not immediately provide the Hoveround and claimant filed an Application for Preliminary Hearing which was set for August 19, 2009. A Stipulated Order for the Hoveround was signed by both parties and ALJ Klein apparently on August 25, 2009. The Stipulated Order was not dated or file-stamped. Nevertheless, respondent still did not provide the agreed to and ordered Hoveround. At claimant's request, another preliminary hearing was held on April 14, 2010, to enforce the Stipulated Order. Respondent asserted Dr. Banwart had withdrawn his prescription for the Hoveround, while claimant countered respondent

⁴ ALJ Order (Jan. 15, 2008) at 1-2.

influenced Dr. Banwart to change his mind. In an April 20, 2010, Order, ALJ Klein again found the Hoveround was a medical necessity.

At a July 7, 2010, preliminary hearing, respondent asked that the Order for the Hoveround be rescinded, but the ALJ indicated only claimant's request for a change in physician was properly before the court. At the time of the July 7, 2010, preliminary hearing, respondent still had not authorized the Hoveround. In an Order dated July 13, 2010, ALJ Klein granted claimant's request to change physicians and authorized Dr. Amundson to provide treatment.

Another preliminary hearing was held on October 13, 2010, at which time respondent asked to cut off all claimant's medical benefits, including rescinding the previous Order for the Hoveround. In an Order dated October 15, 2010, ALJ Klein denied respondent's request. At the July 20, 2012, oral argument to the Board respondent's attorney acknowledged respondent did not provide claimant with the Hoveround until sometime after the October 13, 2010, preliminary hearing.

Claimant testified at the regular hearing that she was 56 years of age, and graduated from high school in 1974. Claimant has no other formal education, but formerly held a CNA/CMA license. Claimant was employed as a home health aide for 23 years, the last six with respondent. In the 15 years prior to claimant's accident in Docket No. 1,033,474, she has had only two employers, respondent and Coffeyville Regional Medical Center. Claimant began receiving Social Security disability benefits in 2008.

At the regular hearing claimant testified she still has constant pain in her lower back and right knee. She has occasional pain in the right ankle and the pain radiates from her low back into both legs. Claimant testified she continues to use a cane to ambulate and can only take five or six steps before having pain. She can stand for five minutes, but then must sit, because of pain. After sitting five minutes, claimant must get up and move. Claimant was being provided palliative care by her family physician, Dr. Michelle Allen, who prescribed Lortab. Because of pain, claimant wakes up two or three times a night, and remains awake for 40 minutes, which causes her to be drowsy and tired the next day.

Claimant testified about the Hoveround at both the July 7, 2010, preliminary hearing and the regular hearing. At the aforementioned preliminary hearing, she indicated that in April 2009, Dr. Banwart prescribed the Hoveround. Respondent did not provide the Hoveround, and claimant testified she was forced to ambulate on her own with a limp, which caused injury to her low back. She indicated that in August 2009, Dr. Banwart changed his mind about the Hoveround. Dr. Banwart's assistant then wrote another prescription for the Hoveround in November 2009. Claimant finally received the Hoveround sometime after October 15, 2010.

At the regular hearing, claimant testified she continued to use the Hoveround. There is a ramp at her sister's house where claimant is living so she can enter and exit

using the Hoveround. Claimant testified she does not use the Hoveround in the house, nor does she transport the Hoveround in her vehicle to use at other locations. However, claimant does drive the Hoveround from her sister's house to church or into town.

The findings of ALJ Moore are set out above.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2006 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2006 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

Docket No. 1,033,475:

At oral argument, respondent acknowledged claimant's right knee condition resulted in an antalgic gait, which in turn led to claimant's low back injury. However, respondent asserted the right knee condition was not caused by the February 5, 2007, accident. That argument is contradicted by the medical testimony of Drs. Amundson and Prostic. Both of those physicians testified that as a result of the claimant's February 5, 2007, severely broken right ankle, she immediately developed an antalgic gait, which in turn aggravated her pre-existing knee and back conditions. They also attributed her right knee and low back injuries to a lack of adequate medical treatment following the accident on February 5, 2007. Dr. Banwart's March 12, 2009, chart note indicated claimant's right knee injury was related to her work injury. As pointed out by ALJ Moore in his Award, Dr. Briggs opined claimant's low back injury was not work related, but was not asked if claimant's February 5, 2007, right ankle injury and resulting antalgic gait aggravated her pre-existing right knee and low back conditions.

Claimant testified at two preliminary hearings that since her February 5, 2007, accident she has had an antalgic gait. Following the accident, claimant used a walker as she was in a cast and later a cam boot. At the regular hearing claimant indicated she still had difficulty ambulating and uses a cane. A Hoveround was prescribed by Dr. Banwart in April 2009, because he "didn't feel her mobility was that good"⁵ after claimant's third knee surgery, and respondent agreed to an Order for the Hoveround. Claimant has proven by a preponderance of the evidence that her pre-existing right knee and low back

⁵ Banwart Depo. at 28.

conditions were aggravated by the direct and natural consequences of her February 5, 2007, work-related right ankle injury and by inadequate medical treatment.

Respondent next asserts claimant is not permanently and totally disabled. The Board disagrees and finds claimant is permanently and totally disabled. K.S.A. 44-510c(a)(2) states:

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

As pointed out by ALJ Moore in his Award, *Wardlow*⁶ requires the fact finder to take into consideration the age, training, previous work history, and physical limitations when determining if an employee is permanently and totally disabled. *Wardlow* also obligates the fact finder to consider the totality of an employee's circumstances, including factors such as driving and transportation problems, being in constant pain, and having to change body positions.

Claimant is limited to sedentary work; was 56 years old on the date of the regular hearing; has significant physical restrictions on her ability to sit, stand and walk; and has no transferrable job skills. She testified of no longer driving because of her injuries. Respondent asserts, that with minimal on-the-job training, claimant could perform an entry level sedentary job. In essence, that is an acknowledgment there are no jobs available in the open labor market for claimant, when taking into consideration her total circumstances.

Respondent argues the Board should not ignore the fact that claimant has not made an attempt to return to the open labor market. The Board and the Kansas Court of Appeals have considered that argument in the past and rejected it. The Board in *Cummings*⁷ stated,

Respondent's *[sic]* also argues that claimant's failure to make a good faith effort to find employment precludes a finding of permanent total disability. A person who is permanently and totally disabled under Kansas workers compensation law, has no requirement to continue to look for work. [Footnote: *Herrera-Gallegos v. H & H Delivery Service, Inc.*, 42 Kan. App. 2d 360, 212 P.3d 239 (2009).] As noted in

⁶ *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

⁷ *Cummings v. State of Kansas*, No. 1,040,560, 2012 WL 1652949 (Kan. WCAB Apr. 20, 2012).

Herrera-Gallegos a job search by someone who is incapable of engaging in substantial gainful employment is the very definition of a fool's errand. The Board affirms the ALJ's Award in all respects.

Respondent requests the Board reverse the ALJ's award of the Hoveround. Dr. Banwart testified that in November 2009, the Hoveround was no longer necessary and was detrimental to claimant's recovery. Stated another way, the Hoveround was not reasonably necessary after November 2009 to cure and relieve the effects of claimant's injuries as required by K.S.A. 2006 Supp. 44-510h(a). His medical opinion is uncontroverted, as no other physician who examined claimant after Dr. Banwart was asked if the Hoveround was medically necessary. Consequently, the Board finds that the implied award of the Hoveround should be reversed.

The Board notes that respondent chose to ignore the April 27, 2009, prescription for the Hoveround from claimant's authorized treating physician, Dr. Banwart. It also failed to provide the Hoveround, after agreeing to do so in an August 2009 Stipulated Order signed by its attorney. Even after ALJ Klein ruled the Hoveround was a medical necessity in his April 20, 2010, Order, respondent failed to provide claimant the Hoveround. Respondent finally provided claimant the Hoveround sometime after October 15, 2010, when ALJ Klein refused to rescind the August 2009 Order. That caused claimant to not receive the Hoveround for at least 17 months after it was prescribed by an authorized treating physician, during which time claimant was ambulating on an injured right ankle and knee. The actions of respondent are inexcusable and reprehensible.

Next, respondent asks the Board to overturn the ALJ's finding that claimant is entitled to future medical benefits. The medical evidence clearly indicates claimant will require future medical treatment for her right knee and may also require future medical treatment for her low back injury. Dr. Amundson indicated claimant will likely need future surgery on her right knee. Claimant is currently prescribed Lortab for pain and has a great deal of difficulty ambulating. The Board finds future medical will be considered upon proper application and approval by the Director of Workers Compensation.

Docket No. 1,036,262:

Claimant filed a separate claim alleging she suffered a right knee injury on August 7, 2007. Respondent contested the claim on the theory that the injury occurred when claimant was engaged in an activity of day-to-day living. Claimant then responded by claiming the August 7, 2007, right knee injury was the direct and natural consequence of the February 5, 2007, incident. The Board concurs with claimant.

The facts in the current claim are similar to those in *Volpert*.⁸ Volpert sustained a work-related left knee injury in April 2007 and settled the claim. In July 2009, claimant used the restroom at work while wearing a left knee brace. When she used the restroom, more weight was placed on her right leg to compensate for her injured left knee. While rising from the toilet, claimant felt a popping sensation in her right knee and immediately experienced pain. The Board in *Volpert* cited *Johnson*⁹ and held that attempting to stand is a normal activity of daily living, but doing so with a brace is not. The Board in *Volpert* also concluded that the injury suffered in the restroom was the direct and natural consequence from her original injury, not a new and distinct injury. In the present claim, claimant's acts of lowering herself and rising from the toilet are normal activities of daily living, but doing so with a severely injured right ankle and knee is not. Accordingly, the Board finds claimant's August 7, 2007, right knee injury was a direct and natural consequence of the February 5, 2007, injury. As stipulated by the parties, claimant suffered no permanent impairment as a result of the August 7, 2007, accident.

CONCLUSION

Docket No. 1,033,474:

Claimant sustained no permanent impairment of function and is not in need of future medical treatment.

Docket No. 1,033,475:

1. Claimant sustained injury to her right ankle on February 5, 2007. As a direct and natural consequence of that injury and inadequate medical care, claimant sustained a right knee injury and a non-scheduled low back injury. The aforementioned injuries resulted in a permanent functional impairment of 30% to the body as a whole.

2. Claimant is permanently and totally disabled.

3. At the time the Award was entered, the Hoveround was no longer reasonably necessary to cure and relieve the effects of claimant's injuries.

4. Claimant is entitled to future medical benefits upon proper application and approval by the Director of Workers Compensation.

⁸ *Volpert v. Eagle Support Services Corporation*, Nos. 1,042,658 & 1,047,841, 2010 WL 2242755 (Kan. WCAB May 27, 2010).

⁹ *Johnson v. Johnson County*, 36 Kan. App. 2d 786, Syl. 2, 147 P.3d 1091, rev. denied 281 Kan. ____ (2006).

Docket No. 1,036,262:

1. Claimant's right knee injury sustained on August 7, 2007, was the direct and probable consequence of her February 5, 2007, work-related injury.

2. Claimant sustained no permanent impairment of function and is not in need of future medical treatment.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹⁰ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board reverses that part of the March 27, 2012, Award entered by ALJ Moore that impliedly awards claimant the Hoveround. Respondent has 30 days from the date this Order is entered to retrieve the Hoveround from claimant, or the Hoveround will remain the property of claimant. The remainder of the March 27, 2012, Award of ALJ Moore is affirmed.

IT IS SO ORDERED.

Dated this ____ day of September, 2012.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

¹⁰ K.S.A. 2011 Supp. 44-555c(k).

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